UNITED MERCHANT FINANCE BHD

v.

MAGPIE RESOURCES SDN BHD

HIGH COURT MALAYA, IPOH
SU GEOK YIAM JC
[COMPANIES' WINDING-UP NO: 28-70-1999]
24 AUGUST 2000

COMPANY LAW: *Winding-up - Petition - Affidavit opposing petition - Whether filed out of time - Whether petitioner waived right to object to admissibility - Service of notice of demand by A.R. registered post - Whether good service - Whether s. 218(2)(a) Companies Act 1965 complied with*

The petitioner finance company filed a winding-up petition against the respondent private limited company under s. 218 of the Companies Act 1965 ('the Act') on the grounds that the respondent was unable to pay a judgment debt of RM196,082.96 obtained by the petitioner against the respondent in the sessions court.

The issues were: (1) whether the respondent's affidavit in enc. 14 filed by the respondent to oppose the petition was inadmissible as it was filed out of time based on the case of *Crocuses & Daffodils (M) Sdn Bhd v. Development & Commercial Bank Bhd*; (2) whether the petitioner had waived its right to object to the admissibility of encl. 14 following the case of *Malayan Banking Bhd v. Lim Tee Yong & Ors*; and (3) whether the respondent failed to comply with s. 218 of the Act by serving the s. 218 notice by A.R. registered post to the respondent's registered office.

Held:

[1] The petition was first fixed for hearing on 15 December 1999 but subsequently adjourned a number of times before hearing commenced on 26 June 2000. Enclosure 14 was only filed by the respondent on 4 May 2000. Applying the case of *Crocuses & Daffodils (M) Sdn Bhd v. Development & Commercial Bank Bhd,* encl. 14 should be held inadmissible.

[2] In *Malayan Banking Bhd v. Lim Tee Yong & Ors* the defendant who objected to the plaintiff's affidavit because it was filed out of time did actually waive his right by filing an affidavit-in-reply to the plaintiff's affidavit. In the present case, the petitioner did not take any step to reply to the respondent's affidavit and thus the argument of waiver of right must fail. With the inadmissibility of encl. 14, the winding-up petition stood unopposed.

[3] The service of a s. 218 notice by A.R. registered post to the respondent's registered office was in fact actual delivery of the said notice to the respondent's registered office and thus should be accepted as good service of the said notice. Therefore, s. 218(2)(a) of the Act was complied with.

[Order in terms of petition.]

Case(s) referred to:

Crocuses & Daffodils (M) Sdn Bhd v. Development & Commercial Bank Bhd [1997] 3 CLJ 485 ***(foll)***

Evergrip Prestressing Sdn Bhd v. Ken Bina Sdn Bhd (formerly known as Ken Construction & Trading Sdn Bhd) [1991] 3 CLJ 2149 ***(refd)***

Malayan Banking Bhd v. Lim Tee Yong & Ors [1994] 4 CLJ 558 ***(dist)***

Weng Wah Construction Co Sdn Bhd v. Yik Foong Development Sdn Bhd [1994] 3 CLJ 511 ***(foll)***

Legislation referred to:

Companies Act 1965, s. 218(2)(a)

Companies Winding-up Rules 1972, rr. 26, 30

For the petitioner - Yau Wai Leong; M/s Chan & Assoc

For the respondent - Apparao Apana; M/s Tengku Azlina, Rao, Low & Assoc

Reported by Usha Thiagarajah

JUDGMENT

Su Geok Yiam JC:

This is a winding-up petition filed by the petitioner, a finance company, against the respondent which is a private limited company incorporated under the Companies Act 1965 (hereafter referred to as 'the Act') on 23 November 1992. This petition was filed under s. 218 of the Act on the grounds that the respondent was unable to pay a judgment debt of RM196,082.96 together with interest thereon at 8% p.a from 23 April 1998 till realisation as spelt out in the summary judgment obtained by the petitioner against the respondent in Ipoh Sessions Court Civil Suit No. 52-451-97.

In the petition, the petitioner stated that a notice of demand under s. 218(2)(a) of the Act was posted to the respondent's registered office by way of A.R. registered post demanding payment of RM194,704.71 within 21 days and the receipt of the A.R. card was acknowledged by the respondent (exh. "TPK3", encl. 2). The respondent failed to comply with the statutory notice of demand. Hence this petition to wind up the respondent's company was filed which also sought the appointment of the official receiver as provisional liquidator.

After the petition was filed, two creditors namely, Yee Hoong Loong Corp Sdn Bhd and Abdul Rashid Asari filed their respective notices of intention *vide* encl. 7 dated 9 December 1999 and encl. 12 filed on 20 April 2000 supporting this winding-up petition.

In reply to this petition, the respondent filed an affidavit (encl. 14) dated 4 May 2000 to oppose the petition. During the hearing of the petition, the learned petitioner's counsel objected to this affidavit on the ground that it was filed out of time. According to the learned counsel for the petitioner, r. 30 of the Companies Winding-up Rules 1972 provides that an affidavit in opposition to a petition shall be filed and served on the petitioner at least seven days before the time appointed for the hearing of the petition. In our present case, the first hearing date of this petition was 15 December 1999. The learned petitioner's counsel quoted the case of *Crocuses & Daffodils (M) Sdn Bhd v. Development & Commercial Bank Bhd* [1997] 3 CLJ 485 in support of his contention.

The learned respondent's counsel in reply, while agreeing that *Crocuses & Daffodils* case *(supra)* applied here submitted that after the affidavit in opposition was filed by the respondent on 4 May 2000, the petitioner did not object to the admissibility of the affidavit on the hearing date, *ie*, 20 June 2000. As such it amounts to a waiver of its right to object to the admissibility of the affidavit at encl. 14. The learned respondent's counsel referred to the case of *Malayan Banking Bhd v. Lim Tee Yong & Ors* [1994] 4 CLJ 558 in support of his argument because in that case Mohd. Hishamuddin, JC (as he then was) had found as a fact that when the case first came up for hearing, the learned defendants' counsel had not objected to the enclosure concerned but had instead asked for a postponement to file an affidavit-in-reply. As a result thereof, the learned judge held that it amounted to a waiver of the defendants' right to object and as such they were estopped from raising any objection under O. 32 r. 13(2)(6).

I accepted the argument of the learned petitioner's counsel in the light of the judgment of the Court of Appeal in the *Crocuses & Daffodils* case *(supra)* where at p. 491, Siti Norma Yaakob, JCA said as follows:

> By their words and expression, Rule 30(1) is mandatory in nature and as such, the learned judge was correct when he refused to admit all four affidavits in opposition for non compliance of that particular rule. The fact that the four affidavits were only relied upon on 24 November 1995 does not alter the position as such affidavits were intended for use in the earlier hearings which never took place as all the earlier hearings were adjourned for some reason or other.

In the present case, the petition was first fixed for hearing on 15 December 99 but subsequently adjourned to 18 February 2000, 17 March 2000, 13 May 2000 and lastly hearing commenced on 20 June 2000. Encl 14 was only filed by the respondent on 4 May 2000. Applying the same *ratio* of the *Crocuses & Daffodils* case *(supra)*, I am of the view that encl. 14 should be held inadmissible. I am also of the opinion that the question of waiver of right to object as was decided in *Lim Tee Yong*'s case *(supra)* is not applicable here because in *Lim Tee Yong*'s case *(supra)* the defendant who objected to the plaintiff's affidavit because it was filed out of time did actually waive his right by filing an affidavit-in-reply to the plaintif's affidavit. In the present case, the petitioner did not take any step to reply to the respondent's affidavit and thus the argument of waiver of right must fail.

Having held that encl. 14 is inadmissible, it follows that this winding-up petition stands unopposed. As such I do not propose to touch on the issues raised in encl. 14, for example, the commercial solvency of the respondent company, the contention that the s. 218 notice was bad for not stating the correct outstanding figure, that the affidavit verifying the petition was not signed by an authorised officer under r. 26 of the Companies Winding-Up Rules 1972 and that the respondent was not served with a sealed copy of the petition.

Nevertheless, I would like to touch on one point of law that was raised by the respondent in respect of the service of the s. 218 notice. In the present case, the s. 218 notice was served by A.R. registered post to the respondent's registered address. The learned counsel for the respondent had submitted that s. 218 of the Act requires service to be done by leaving the notice of demand at the registered office of the company and nothing short of that will suffice. He then referred to the case of *Evergrip Prestressing Sdn Bhd v. Ken Bina Sdn Bhd (formerly known as Ken Construction & Trading Sdn Bhd)* [1991] 3 CLJ 2149 to support his contention and submitted that the non-compliance of this mandatory requirement is fatal to this petition. The learned counsel for the petitioner however submitted another High Court authority, namely, *Weng Wah Construction Co Sdn Bhd v. Yik Foong Development Sdn Bhd* [1994] 3 CLJ 511 which held that proof of actual physical delivery by a postal officer of a registered letter containing a notice of demand at the registered office of the company could be effective service within the terms of s. 218(2) of the Act as what is important is the adequate proof of physical delivery of the said notice by the creditor.

Upon reading both the High Court cases on the same point, I find that I am more persuaded by the rationable in the *Weng Wah*'s case *(supra)* which was relied upon by the learned petitioner's counsel and I, too, hold the view that the service of a s. 218 notice by A.R. registered post to the respondent's

registered office was in fact actual delivery of the said notice to the respondent's registered office and thus should be accepted as good service of the said notice.

Therefore I was of the view that the argument of non-compliance with s. 218(2)(a) of the Act should be rejected.

Based on the reasons set out above, I granted order-in-terms of the petition.